

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9403 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO

R N NAIK HIGH SCHOOL

Versus

B S JHA

Appearance:

1. Special Civil Application No. 9403 of 2003
MR SHIRISH JOSHI for Petitioner No. 1
MR NV GANDHI for Respondent No. 1
MR HD DAVE, ASST. GOVT. PLEADER for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 09/08/2004

ORAL JUDGEMENT

1. Rule. Mr. N.V. Gandhi learned advocate for respondent No.1 and Mr. H.D. Dave, learned Assistant

Govt. Pleader for respondent No.2, waive service of rule for the respective respondents.

2. The petitioner has challenged the order of District Education Officer for directing absorption of respondent No.2 in the school of the petitioner.

3. Heard Mr. Joshi for the petitioner, Mr. Gandhi for respondent No.1 and Mr. H.D. Dave for respondent No.2.

4. Upon hearing the learned counsel appearing for the parties, it appears that there is no dispute on the point that the issues which are raised in this petition are covered by the decision of this Court dated 9th October 2003 in Spl. C.A. No. 1065 of 2002 and allied matters in the case of Atladara Kelavani Mandal & Others vs. State of Gujarat and others. However, Mr. Joshi, learned counsel appearing for the petitioner submitted that as per the observations made by this Court in the said decision at paragraph 20, it was observed as under:-

"20. The other contention raised on behalf of the petitioners that the clause leaving all powers to the DEO and the State to direct for absorption, irrespective of the qualification of the teachers, without there being any choice to the management, is violative of Article-14 of the Constitution of India, deserves consideration. It appears that the State, even while formulating the policy, may be in the matter of providing of the grant-in-aid or regulating such grain-in-aid, cannot act arbitrarily. It would be the duty of the State to ensure that quality of education is maintained and an absurd situation is not created, which basically frustrates and seriously damages the purpose of the education. Therefore, the State, while framing such policy, has to keep in mind that the quality of education is not disturbed or that appropriate norms providing for qualification of the concerned teacher or the staff are maintained. If the matter is examined accordingly, it is true that as per the petitioners, certain persons, who are not qualified for the post are ordered to be absorbed. For example, vacancy is of a teacher in 'A' subject whereas the person posted is a teacher in 'B' subject. There are also certain cases in this group of petitions where unqualified persons are posted over the post. Such a situation, in my view, can never be said

to be intended by the State even while inserting Clauses -64.3 in the Code. On a true and correct interpretation of clause-64.3 of the Code, it appears that the DEO, while directing for absorption of the surplus staff, has to bear in mind the qualification of the person, who is ordered to be absorbed vis-a-vis the post which is vacant. The person, who is declared surplus and who is ordered to be absorbed, must fulfil the requisite qualification for imparting education in the said subject or must fulfil the requisite criteria and qualification for discharging the work in case if he belongs to the category of non-teaching staff. DEO, while directing absorption of teacher or non-teaching post, is required to consider as to whether such teacher holds basic qualification for such non-teaching staff or not. Therefore, if the DEO has not considered the qualification of the person, who is ordered to be absorbed, and the qualification of the person required for filling up of the vacancy, the order would be beyond the cope and ambit of power under clauses 64.3 of the Code. Similarly, on a true and correct interpretation of clause-64.3 of the Code, it appears that the DEO, while considering the question for directing absorption in the school, should also ensure that the quality of education in the said school is not put to jeopardy or is not damaged. It may be that in 'A' school, the standard of other teachers may be high and as a result thereof, the school may be gaining the reputation where good education is being provided, and, therefore, the school or the management may be reluctant in absorbing a teacher, who may not be upto the mark or upto the standard of the school. The aforesaid does not mean that the school for extraneous considerations, declines to absorb the teachers or gets any right to refuse absorptions, but, at the same time, it will be the duty of the DEO to consider the said aspects while taking decision for ordering absorption. Similarly, nothing prevents the DEO from giving some choice to the school if more than one surplus teacher or surplus staff is available for absorption. If only one teacher is available, then school has no option but to absorb such teacher but if there is more than one teacher in such subject as surplus, then if such a choice is given to the management, it would encourage a good atmosphere and would

rather subserve the intention with which clause-64.3 is inserted in the Code, and would also be in the interest of atmosphere of the school and also the relations between the management and the person concerned, who is ordered to be absorbed. There cannot be any exhaustive list for dealing with various contingencies, but, it may be individual action of the DEO, which may fail or which may be bad, if such aforesaid considerations are not taken into account and in a mechanical manner or with some extraneous considerations, the order for absorption is passed. Therefore, while considering the individual case for examining the order of the DEO, the matter will have to be considered accordingly, and if the DEO fails to consider the said aspects, it will be for the Director of Education to issue suitable guidelines for regulating the exercise of power by the DEO as per clause 64-3 of the Code."

5. Mr. Joshi, therefore, submitted that one of the contentions of the petitioner in this petition is that Respondent No.1 is not qualified to be appointed as English teacher. In furtherance to the said submission, he relied upon the NOC granted by the DEO which provides for the qualification of M.A., B. Ed. for English subject. He, therefore, submitted that there are two requirements for qualification, one is that the person should be B.A., B. Ed with 7 years experience in the secondary section and the respondent No. 1 is not having such experience. As against the same, on behalf of the respondent No. 1, it has been submitted by Mr. Gandhi that he is qualified for the post. It has also been submitted by learned A.G.P. Mr. Dave that the respondent No. 1 is qualified for the post. It is also submitted by Mr. Joshi that in any case, no hearing or opportunity is given for giving option and the matter in any case is not examined for giving option to the petitioner school in case more than one surplus teachers are available, and who can be absorbed in the petitioner school in place of the respondent No.1.

6. In view of the above, I find that the as the matter is not considered by the DEO in the light of the observations made by this Court, more particularly the aforesaid paragraph 20 of the decision of this Court, it would be just and proper to direct the DEO to consider the question regarding absorption of the respondent No.1 in the petitioner school keeping in view the observations made in paragraph 20 of the aforesaid decision. The DEO

shall examine the matter afresh on the aspect as to whether the respondent No. 1 is qualified for the post in question, and if yes, whether it is possible for the DEO to give an option to the petitioner school if there are more than one teacher holding necessary qualifications. The DEO may also give hearing to the petitioner school and shall render decision afresh as early as possible, preferably within one from from the date of receipt of this order. It is made clear that after appropriate decision is taken by the DEO in light of the aforesaid decision of this Court and observations made hereinabove, and communicated to the petitioner school, it would be open to the DEO to take necessary steps in case the petitioner school does not absorb the respondent No.1 or any other teacher who may be ordered by the DEO for absorption. The aforesaid shall be without prejudice to the rights of the petitioner to challenge the decision of the DEO in accordance with law.

7. This petition is allowed only to the aforesaid extent. Rule made partly absolute accordingly. No order as to costs.

[JAYANT PATEL, J.]
mathew